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In The
Supreme Court of the United States

October Term, 1973

No. 73-1868

SALVATORE TERRACIANO,

Petitioner,

vs.

ERNEST MONTANYE, Superintendent of Attica Correctional Facility,

and

CARL F. DRAXLER, Sheriff of Chemung County,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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June, 1974

Daily Record Corporation
Rochester, New York
(461)

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CARL F. DRAXLER, Sheriff of Chemung County,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Petitioner, Salvatore Terraciano, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on March 14, 1974.

Opinions Below

The opinion of the court of appeals is reported at 493 F.2d 682, and is reprinted in Appendix A, *infra*. The opinion of the district court, Curtin, J., is reported at 360 F.Supp. 1377, and is reprinted in Appendix B, *infra*.

Jurisdiction

Petitioner, a licensed pharmacist, was convicted in Chemung County, New York, for various narcotics offenses stemming from his failure to possess an appropriate tax stamp. The Appellate Division affirmed his conviction, 39 A.D. 2d 1005, 333 N.Y.S. 2d 903, and the New York Court of Appeals denied leave to appeal. Petitioner sought and secured a writ of habeas corpus in the United States District Court for the Western District of New York on July 23, 1973. On March 14, 1974 the Court of Appeals for the Second Circuit reversed the district court order and directed the dismissal of the petition. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether the general warrantless "administrative" search for evidence to be used in a criminal proceeding violated petitioner's rights under the fourth and fourteenth amendments.

2. Whether the New York Public Health Law provisions authorizing administrative searches of over 5,000 pharmacies and hospitals, involving over 18,000 registered pharmacists, 37,000 physicians and 1,200 drug manufacturers, are unlimited in time and place in violation of the fourth and fourteenth amendments.

Constitutional Provisions Involved

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV

[N]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

* * *

Statutory Provisions Involved

We have reproduced New York Public Health Law, §§ 3350, 3385 and 3390 in Appendix C, *infra*.

Statement of Facts

Petitioner has been a licensed pharmacist for twenty-three years (38).[1] In May, 1968 he opened his own pharmacy in the village of Horseheads, New York, under the name Windsor Pharmacy (37).

On Thursday, April 10, 1969, Michael Capozzi, a state police officer, entered petitioner's pharmacy. He walked behind the drug counter, otherwise closed to the public, flashed his credentials and ordered petitioner to permit him access to the pharmacy records (38-39). Petitioner, in his many years as a pharmacist, had never experienced a police officer making such a demand (41). He told Capozzi to "wait a minute" while he called his attorney (40). Capozzi, becoming "hot under the collar," said, "Are you refusing me access to [your] records?" Petitioner responded, "I'm just exercising my constitutional right to check with my attorney. As far as I know, you have no right" (41).

Capozzi left, but returned the next day, Friday, with an arrest warrant and four other police officers. He arrested petitioner for

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[1] Refers to pages in respondents' appendix in the Second Circuit Court of Appeals.

"obstructing governmental administration" (41-42). Petitioner was then taken into custody, whisked out of his pharmacy and arraigned before a Village Justice (42).

The "Administrative" Search

On Monday, April 14, 1969, Capozzi returned to the Windsor Pharmacy with Theodore Kowitt, an investigator with the State Narcotic Control Bureau (11, 43). Capozzi said to petitioner, "Let Mr. Kowitt in behind the drug counter to this prescription department" (43). Before leaving, Capozzi said to Kowitt, "Let me know if you find anything, Ted" (43).

Kowitt, who had examined petitioner's narcotics file and exempt narcotics book only two months previously (12, 47), admittedly had no reason for investigating petitioner's records other than Capozzi's request for him to do so (10, 11). Kowitt knew that petitioner had just refused the state police access to these records, that Capozzi had arrested petitioner and that a criminal charge was pending against him (18-19, 21). Kowitt's investigation, *i.e.*, the object of his search, was dictated by the state police (11). Moreover, Kowitt never advised petitioner of the purpose of his investigation (20), and seized records which appeared to him to be "suspicious" (23-24). In short, Kowitt's warrantless search was general in nature, nothing more than a fishing expedition for evidence to be used by the police in a criminal proceeding (24).

Petitioner Unable to Prevent Search

At the very outset, Kowitt gave petitioner his *Miranda* warnings and petitioner immediately called his attorney (4). Before the attorney could get to the pharmacy, however, Kowitt began a review of petitioner's records and a general audit. Petitioner, fearing another arrest, was not free to interfere with Kowitt's search (44). Kowitt's investigation lasted for two days (21, 22). When he was finished, he confiscated a large number

of records, drug invoices and letters (25-26). Kowitt later testified before the grand jury which indicted petitioner, and many of the items he had seized were received in evidence (33).[2]

Petitioner was indicted for a number of violations stemming from his alleged failure to possess a federal tax stamp (25). His suppression motion having been denied, petitioner pled guilty to two counts of the indictment to pursue his constitutional claims on appeal. He was given concurrent indeterminate sentences of three years imprisonment. The conviction was ultimately affirmed by the Appellate Division[3] and leave to appeal was denied by the New York Court of Appeals.

Federal Habeas Corpus

Having exhausted his state remedies, petitioner sought a federal writ of habeas corpus pursuant to 28 U.S.C. §2254(b). On July 23, 1973, Hon. John T. Curtin sustained the writ, holding that New York Public Health Law, §§3350 and 3390 do not sufficiently limit the time and place for warrantless administrative searches.

Second Circuit Opinion

The court of appeals advised the New York legislature to remodel "its regulatory inspection statutes."[4] The court, relying upon an asserted Health Department policy to make regulatory inspections only during business hours, held that the New York statutes are not "so seriously deficient" as to render this search unconstitutional. (*Ibid.*)

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[2]Kowitt never talked with any of the persons for whom petitioner had filled the seized prescriptions (32).

[3]*People* v. *Terraciano*, 39 A.D. 2d 1005, 333 N.Y.S. 2d 903 (3d Dept. 1972).

[4]493 F.2d at 685; A-7, *infra*.

Reasons for Granting the Writ

POINT I

The warrantless "administrative" search for evidence to be used in a criminal proceeding violated petitioner's rights under the fourth and fourteenth amendments.

The major question presented in this petition is whether the state police may conduct a forcible search of a pharmacy for incriminating evidence to be used in a criminal proceeding under the thin pretense of a "record inspection" authorized by the New York Public Health Law. Such a search goes far beyond any previously sanctioned by this Court and cannot be justified by the constitutionally deficient state statute.

The General Search

It is undisputed that the state police, only three days before this illegal search, unsuccessfully tried to search without a warrant. Under the fourth and fourteenth amendments a search conducted without a warrant issued upon probable cause is "*per se* unreasonable." *Katz* v. *United States*, 389 U.S. 347, 357 (1967). The unauthorized search here was resisted by petitioner, who quite properly stood his constitutional ground and refused to permit officer Capozzi to explore his records. The state police then contrived the scheme whereby a Narcotic Control officer conducted their search for criminal evidence. Indeed, as inspector Kowitt bulled his way behind the prescription counter to petitioner's file cabinets and record books, trooper Capozzi said to him, "Let me know if you find anything, Ted." (43).

Kowitt, whose annual routine examination of petitioner's records had been conducted only two months earlier, admitted that he was searching generally, at the behest of officer Capozzi (9, 11). Clearly, this search was a brazen attempt by the state

police to do by indirection what they were otherwise unable to do.[5]

This case presents a question left unresolved in *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970), and *Biswell* v. *United States*, 406 U.S. 311 (1972):

> May state police officers lacking probable cause, with the assistance of a state administrative investigator, conduct a general warrantless search for evidence of crime under the guise of a statutory administrative search?

An elementary comparison of the statute involved in *Colonnade* with that employed here immediately demonstrates the constitutional shortcomings of the present statutes. The search in *Colonnade*, by Treasury agents looking for illicitly refilled liquor bottles, was held unlawful because the statute[6] did not provide for the use of force in effecting the search. Rather, that statute authorized searches only of the actual premises during "business hours." Nighttime searches were authorized only when the establishment was open.

In *Biswell* v. *United States*, 406 U.S. 311 (1972), the Court upheld a consensual search authorized by the federal Gun Control Act.[7] Section 923-g of Title 18 allows official entry into gun dealers' premises only during business hours and specifically authorizes inspection of the records and premises, including storerooms. In *Biswell*, the owner, after being shown a copy of §923-g, consented to the search of a locked storeroom in which were found two sawed-off shotguns.

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[5]General searches have been universally condemned. *Stanford* v. *Texas*, 379 U.S. 476 (1965); *Marcus* v. *Search Warrants*, 367 U.S. 717 (1961); *Mapp* v. *Ohio*, 367 U.S. 643 (1961); *Marron* v. *United States*, 275 U.S. 192 (1927); *Boyd* v. *United States*, 116 U.S. 616 (1886).

[6]26 U.S.C. §§5146(b), 7606 and 7342.

[7]18 U.S.C. §921 *et seq.*

It should be quite apparent to the Court that the present statutes contain none of the limiting features of the carefully drafted federal statutes in *Colonnade* and *Biswell*. *See* Point II, *infra*. And there is no compelling reason why state officers should be permitted to conduct searches for evidence of crime pursuant to a regulatory statute which so completely fails to provide traditional fourth amendment protections.

We appreciate the fact that a person operating a closely regulated business does so with the knowledge that his business records will be subject to inspection.[8] However, the inspection referred to in *Biswell* was for regulatory purposes and was implemented through a statutory scheme which could withstand fourth amendment scrutiny. Surely this Court never intended to completely remove regulatory searches from the reach of the fourth amendment, much less criminal searches camouflaged as administrative regulatory inspections.

Indeed, in *Biswell* the Court wrote:

> "In the context of a regulatory inspection system of business premises that is carefully limited in time, place, and scope, the legality of the search depends not on consent but on the authority of a valid statute." (406 U.S. at 315)

Routine inspections made pursuant to a carefully limited statute may be acceptable. When placed in the setting of general searches for evidence to be used in criminal proceedings, however, their quality is drastically altered. In this context, Chief Justice Burger's observation in *Roaden* v. *Kentucky*, 413 U.S. 496, 501 (1973), is worth repeating:

> "The Fourth Amendment proscription against 'unreasonable . . . seizures' applicable to the States through the Fourteenth Amendment, must not be read in a vacuum. A seizure reasonable as to one type of material in one setting may be unreasonable in a

[8] *Biswell* v. *United States*, 406 U.S. 311, at 316 (1972).

different setting or with respect to another kind of material."

Conflict in the Circuits

This Court's decisions in *Colonnade* and *Biswell* have received irreconcilably conflicting application by the Second and Ninth Circuits, thus requiring a grant of certiorari here. The Second Circuit, recognizing the deficiencies in these Public Health Law sections,[9] nonetheless applied *Colonnade* and *Biswell* to authorize this general warrantless search for criminal evidence. Reaching a contrary application in *United States* v. *Davis*, 482 F.2d 893 (1973), the Ninth Circuit has specifically held that administrative searches may not be used "as part of a criminal investigation." (482 F.2d at 908.)

In *Davis*, remanded by the court of appeals for additional evidence regarding the question of consent, federal authorities conducting a pre-boarding search at the San Francisco International Airport discovered a loaded revolver in Davis' briefcase. The search was conducted pursuant to the federal anti-skyjacking regulations adopted in 1972. The Ninth Circuit emphasized:

> "There is an obvious danger, nonetheless, that the screening of passengers and their carry-on luggage for weapons and explosives will be subverted into a general search for evidence of crime. If this occurs, the courts will exclude the evidence obtained." (482 F.2d at 909; footnotes omitted.)

The Ninth Circuit, applying *Colonnade* and *Biswell* carefully distinguished between searches implemented in pursuit of a regulatory purpose and those constituting part of a criminal investigation to secure evidence of crime. (482 F.2d at 908.) Because of the sharp contrast in the circuit courts' application of *Colonnade* and *Biswell*, this Court should grant certiorari.

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[9]The Second Circuit admonished the New York legislature:

> ". . . to consider remodeling its regulatory inspection statutes to incorporate the safeguards contained in the federal act which was adopted in the light of *Camara* and *See*, 21 U.S.C. §880. . . ." (493 F.2d at 685)

POINT II

The New York Public Health Law provisions authorizing administrative searches of over 5,000 pharmacies and hospitals, involving over 18,000 registered pharmacists, 37,000 physicians and 1,200 drug manufacturers, are unlimited in time and place in violation of the fourth and fourteenth amendments.

Another issue of critical importance in this petition is the excessive breadth of the Public Health Law provisions authorizing administrative searches unlimited in time and place. These statutory enactments, used by the state to justify the search of petitioner's pharmacy, clearly infringe upon his fourth amendment right to be free from unreasonable searches.

In *Camara* v. *Municipal Court*, 387 U.S. 523 (1967), and its companion case *See* v. *City of Seattle*, 387 U.S. 541 (1967), this Court brought administrative searches within the boundaries of the fourth amendment.[10]

Actually, searches for evidence of crime cloaked in "administrative" garb were condemned long before *Camara* and *See*. *Federal Trade Commission* v. *American Tobacco Co.*, 264 U.S. 298 (1924); *Hale* v. *Henkel*, 201 U.S. 43 (1906); *Boyd* v. *United States*, 116 U.S. 616 (1886). We are reminded of Justice Holmes' immortal words in *American Tobacco Co.*:

> "Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate

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[10] The Court stated in *See*:

> "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has the right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant." (387 U.S. at 543)

> agencies to sweep all our traditions into the fire . . ., and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime." (264 U.S. at 305-306)

More recently, in *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970), and *Biswell* v. *United States*, 406 U.S. 311 (1972), the Court has instructed on statute-authorized searches of closely regulated businesses. The Court rejected a search where it went beyond the confines of an acceptable statute (*Colonnade*), and upheld a search where it was conducted within the parameters of a constitutionally valid statute (*Biswell*). In both cases, the relevant federal statutes carefully limited the scope of the search in time and place.[11] Therefore, the present case involves another question left unanswered in *Colonnade* and *Biswell:*

> Where the statute authorizing an administrative search is not carefully limited in time and place, does that statute satisfy fourth amendment requirements?

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[11] The search in *Biswell* was conducted pursuant to the limited authority found in 18 U.S.C. §923-g, which provides in pertinent part:

> "The secretary may enter *during business hours the premises* (including places of storage) of [regulated firearms businesses] for the purpose of inspecting or examining (1) any records or documents required to be kept . . . and (2) any firearms or ammunition kept or stored at such premises." (Emphasis added.)

The inspection in *Colonnade* was conducted pursuant to the authority found in 26 U.S.C. §5146(b), which provides:

> "The secretary or his delegate may enter *during business hours the premises* (including places of storage) of any dealer for the purpose of inspecting or examining any records or other documents required to be kept by such dealer under this chapter . . . ." (Emphasis added.)

Colonnade dealt with the additional provision found in 26 U.S.C. §7606, which provides:

> "(a) Entry during day.
>
> The secretary or his delegate may enter, in the daytime, any building or place where any articles or objects subject to tax are made, produced or kept . . . .
>
> "(b) Entry at night.
>
> When such premises are open at night, the secretary or his delegate may enter them while so open, in the performance of his official duties."

An asserted Health Department policy that investigators shall inspect only during business hours does not cure these defective statutes. For policies are easily changed and the warrantless search in this criminal investigation demonstrates how easily the whole process may be subverted.

In New York there are over 18,000 registered pharmacists working in more than 5,000 pharmacies, hospitals and nursing homes. Approximately 37,000 physicians and 1,200 drug manufacturers are registered in New York and are also subject to regulatory inspection under the state statute.[12] Naturally, they are all vulnerable to warrantless searches at any time. Considering the fact that most regulated businesses and hospitals are annually inspected at least once, and many more frequently, the total number of warrantless invasions of privacy is staggering.

In order to uphold the state statutes, the Second Circuit was forced to adopt the argument that the constitutional safeguards lacking in the Public Health Law may be supplied by the good faith of the inspectors in the field. This Court has specifically rejected that practice in *Katz* v. *United States*, 289 U.S. 347 (1967), and *Berger* v. *New York*, 388 U.S. 41 (1967). *Accord*, *United States* v. *Hinton*, 219 F.2d 324 (7th Cir. 1955).[13]

In marked contrast to the narrowly defined inspection statutes considered in *Biswell* and *Colonnade*, limiting an inspection to "business hours," the statutes here in no way limit the time inspections may be conducted. The statutes specifically authorize an inspection "at all times." Similarly, there is nothing limiting the physical area subject to inspection. In *Biswell* and

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[12]Figures were supplied by the New York State Board of Pharmacy and the New York Health Department Bureau of Narcotic Control, Albany, New York.

[13]The court of appeals relied upon *People* v. *Curco Drugs*, 76 Misc. 2d 222, 350 N.Y.S. 2d 74 (N.Y.Crim.Ct., Kings Co., 1973), but that case involved only a routine administrative inspection, not the criminal investigation for evidence of crime manifest here.

Colonnade inspection was authorized only for the "premises." Under the New York statute, however, if a pharmacist maintained or simply worked on part of his records at his home or some other location, those premises and any vehicles used to transport the records, could fall prey to a warrantless search under the statutory provisions.

At the time of this search, §§3350 and 3390 provided for an astonishing number of persons authorized to conduct a warrantless search.[14] Although the New York legislature attempted to remodel these statutes in 1972 by replacing them with §3385,[15] it completely failed to incorporate the specificity required as to time and place. Thus, despite this Court's instruction in *Colonnade* and *Biswell*, and the example of the comparable federal staute,[16] the New York legislature has carved out its own interpretation of the fourth amendment specificity requirements. Regrettably, the statute did and continues to diametrically conflict with the fourth amendment and this Court's instruction in *Colonnade* and *Biswell*.

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[14] We have set out in Appendix E those persons authorized to search pharmacies without a warrant at the time of this search.

[15] Section 3385 states:

> "1. The department and its representatives shall have access *at all times* to all orders, prescriptions or records required to be kept under this article.
>
> "2. For the purposes of this article, each employee of the department designated by the commissioner shall possess all of the powers of a peace officer." (Emphasis added.)

Section 3385 was added by L. 1972, c. 878, §2, effective April 1, 1973.

[16] See Appendix D where we have set out 21 U.S.C. §880, the federal statute authorizing warrantless administrative searches under carefully limited circumstances.

Conclusion

For all of these reasons, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Court of Appeals Opinion

Court of Appeals Opinion

UNITED STATES COURT OF APPEALS
For the Second Circuit

No. 509 — September Term, 1973.

(Argued February 20, 1974 Decided March 14, 1974.)

Docket No. 73-2382

UNITED STATES ex rel. SALVATORE TERRACIANO,
Petitioner-Appellee,

—v.—

EARNEST MONTANYE, Superintendent, Attica Correctional Facility, and CARL F. DRAXLER, Sheriff of Chemung County,

Respondents-Appellants.

Before:

LUMBARD, FRIENDLY AND TIMBERS,
Circuit Judges.

Appeal by state officers from an order of the District Court for the Western District of New York, John T. Curtin, *Judge*, 360 F. Supp. 1377 (W.D.N.Y. 1973), granting a petition for a writ of habeas corpus to a state prisoner who had pleaded guilty to possessing and selling dangerous drugs in violation of §§ 220.15 and 220.35 of the New York Penal Law, since repealed, L. 1973, c. 276, § 18, on the ground that a seizure of business

records which led to his indictment violated the Fourt Amendment. Reversed, with instructions to dismiss the petition.

D. BRUCE CREW, III, Acting Chemung County District Attorney (Ransom P. Reynolds, Jr., Esq., Elmira, N.Y., of Counsel), *for Appellants.*

MICHAEL J. BROWN, Esq., Buffalo, N.Y. (Herald Price Fahringer, Esq., Paul J. Cambria, Jr., Esq., Lawrence A. Schulz, Esq., and Lipsitz, Green, Fahringer, Roll, Schuller & James, Buffalo, N.Y., of Counsel), *for Petitioner-Appellee.*

FRIENDLY, *Circuit Judge:*

Petitioner, Salvatore Terraciano, a licensed pharmacist, was the owner and operator of the Windsor Pharmacy in Horseheads, Chemung County, N.Y. On April 10, 1969, one Michael Capozzi, a state police officer, entered the pharmacy during business hours, showed his credentials and stated that he wished to examine Terraciano's records. When Terraciano declined to allow this until he had consulted his attorney, Capozzi departed, but returned the next day with four state troopers and a warrant for Terraciano's arrest on a charge of obstructing governmental administration. Terraciano was promptly arraigned and, apparently, was immediately released. On April 14, Capozzi returned, accompanied on this occasion by Theodore Kowitt, an investigator with the State Narcotic Control Bureau. Kowitt advised Terraciano that he was conducting an investigation relating to the diversion of controlled drugs in Chemung County and wished to audit the pharmacy's records of "narcotics, accepted narcotic preparations and depressant and stimulant drugs," an examination authorized by §§ 3350 and 3390 of the New York Public Health Law as they

then read, which are reproduced in the margin.[1] Kowitt gave appropriate *Miranda* warnings, and Terraciano proceeded to telephone, apparently to his attorney, who shortly arrived, and neither of them made any protest about Kowitt's activities. Kowitt, who had begun inspecting the records, continued the examination for two days and took into his possession eight narcotic prescriptions, nine depressant and stimulant drug prescriptions, and seventeen records pertaining to depressant

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[1]Section 3350 read as follows:

1. It is hereby made the duty of the department, its officers, agents, inspectors and representatives, and of all peace officers within the state, and of the judicial and police authorities of the state and of the political subdivisions thereof to enforce all provisions of this article, except those specifically delegated, and to cooperate with all agencies charged with the enforcement of the laws of the United States,[1] of this state, and of all other states relating to narcotic drugs.

2. Such authorities and their agents shall have access at all times to all orders, prescriptions or records to be kept under this article.

3. For the purposes of this article, each representative of the commissioner shall possess all of the powers of a peace officer.

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[1]21 U.S.C.A. §801 et seq.

Section 3390 read as follows:

1. It is hereby made the duty of the department, its officers, agents, inspectors and representatives, and of all peace officers within the state, and of the judicial and police authorities of the state and of the political subdivisions thereof to enforce all provisions of this article, except those specifically delegated, and to cooperate with all agencies charged with the enforcement of the laws of the United States, of this state, and of all other states relating to depressant or stimulant drugs.

2. Such authorities and their agents shall have access at all times to all orders, prescriptions or records to be kept under this article.

3. For the purposes of this article, each representative of the commissioner shall possess all of the powers of a peace officer.

These were repealed by L. 1972, c. 878, § 1, and replaced, *id.* § 2, by new § 3385, which reads as follows:

1. The department and its representatives shall have access at all times to all orders, prescriptions or records required to be kept under this article.

2. For the purposes of this article, each employee of the department designated by the commissioner shall possess all of the powers of a peace officer.

and stimulant drugs. Presentation of certain of these records to a grand jury resulted in a 29 count indictment.

Terraciano moved to suppress the records on the ground that the search and subsequent seizure violated his rights under the Fourth Amendment. Chemung County Judge Monroe denied the motion on the basis that Terraciano was engaged in a business subject to state regulation. Under § 813-c of the New York Code of Criminal Procedure as it then read, which allowed a defendant to plead guilty but to appeal the denial of a motion to suppress the results of an allegedly unlawful search or seizure, the prosecutor permitted Terraciano to plead guilty to two of the 29 counts, on which he was given concurrent indeterminate sentences not to exceed three years.

On Terraciano's appeal the Appellate Division affirmed, 39 A.D.2d 1005, 333 N.Y.S.2d 903 (3rd Dept. 1972) (*mem.*), stressing that the search was limited by the statute to records of narcotic, depressant and stimulant drugs, and citing *McKaba* v. *Board of Regents of University of State of New York*, 30 A.D.2d 495, 294 N.Y.S.2d 382 (3rd Dept. 1968), which held, although in a rather different context, that in accepting his license a pharmacist had impliedly consented to state inspection. Judge, now Chief Judge, Breitel denied leave to appeal to the Court of Appeals.

Terraciano then filed a petition for habeas corpus in the District Court for the Western District of New York.[2] Noting that in his view the State could not successfully contend that Terraciano had consented to the search, see *Schneckloth* v.

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[2]We have held that defendants who availed themselves of the course of pleading guilty but reserving a right to appeal under § 813-c of the New York Code of Criminal Procedure did not forfeit their right to seek federal habeas. *U.S. ex rel. Rogers* v. *Warden*, 381 F.2d 209 (2 Cir. 1967); *U. S. ex rel. Molloy* v. *Follette*, 391 F.2d 231 (2 Cir.), *cert. denied*, 391 U.S. 917 (1968). The Supreme Court left an analogous question open. *McMann* v. *Richardson*, 397 U.S. 759, 770 n.13 (1970).

Bustamonte, 413 U.S. 218 (1973), and being apparently unconvinced by the implied consent theory of *McKaba* v. *Board of Regents*, *supra*, Judge Curtin granted the writ on the ground that the New York statutes authorizing the search were not sufficiently limited to justify the failure to obtain a warrant, 360 F. Supp. 1377 (W.D.N.Y. 1973). Since we disagree with this ruling, we need not consider the State's arguments based on the alternative theories of consent.

The Supreme Court's holdings in *Camara* v. *Municipal Court*, 387 U.S. 523 (1967), and *See* v. *City of Seattle*, 387 U.S. 541 (1967), that administrative searches were subject to the warrant requirement of the Fourth Amendment were rather promptly narrowed, as, indeed, had been foreshadowed by *Camara* and *See* themselves, 387 U.S. at 533 and 545-46, in *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970). Although a divided Court reversed our decision, 410 F.2d 197 (1969), upholding the search there at issue, none of the Justices disagreed with the portion of Judge Mansfield's thoroughly reasoned opinion which generally sustained warrantless searches under statues limited to records maintained or products held by regulated industries, in that instance a catering establishment possessed of a liquor license, see 410 F.2d at 200-04; rather the reversal was based on the view of the majority that the statute there at issue did not confer authority for a forcible entry. *Colonnade* was followed by *United States* v. *Biswell*, 406 U.S. 311 (1972), where the Court sustained a warrantless search during business hours of books and a locked storeroom under the authority of the Gun Control Act of 1968, 18 U.S.C. § 923(g).

The district court thought the search and seizure here at issue violated the Fourth Amendment because of a reference in the *Biswell* opinion to "a regulatory inspection system of business premises that is carefully limited in time, place, and scope." 406 U.S. at 315. This overreads Mr. Justice White's remark. The

important distinction is between what Judge Mansfield described in *Colonnade*, 410 F.2d at 201, as the "expansive grants of authority" at issue in *Camara* and *See*, which "would permit an inspector, unless a warrant was required, to roam at will through any portion of a dwelling house, in one case, or of commercial property, in the other, without the occupant or owner being able to determine the need for the inspection, its purpose and its lawful limits" and an inspection statutorily limited to the business records and goods of industries that are properly subject to intensive regulation in the public interest. In instances of the former type a warrant serves the valuable office of preventing a "general search"; in the latter, the warrant, which would be issued for the asking, would simply track the statute and would give the person who was the object of the search nothing more than he already had. See 410 F.2d at 201.

The New York statutes which furnished the authority for Kowitt's search were limited to orders, prescriptions or records relating to narcotic, depressant and stimulant drugs, which other New York statutes required to be kept on the premises, Public Health Law §§ 3333(3) and 3388(3) as they then read, and Kowitt neither searched for nor seized anything else. Contrast *Finn's Liquor Shop, Inc.* v. *State Liquor Auth.*, 24 N.Y.2d 647, 301 N.Y.S.2d 584, *cert. denied*, 396 U.S. 840 (1969) (administrative inspection expanded so far as to search coat pocket). Although unlike the federal statutes considered in *Colonnade* and *Biswell*, 26 U.S.C. §§ 5146(b) and 7606, and 18 U.S.C. § 923(g), the New York statutes did not then and do not now, Public Health Law § 3385, expressly limit entries for inspection to business hours, they never have conferred authority to make a forcible entry into premises that are closed, and a thoughtful opinion by a New York court, differing in its view of the law and its result from Judge Curtin's decision here, informs us that "it is the policy of the Health Department to perform inspections only during business hours." *People* v.

Curco Drugs, 76 Misc. 2d 222, ——, 350 N.Y.S. 2d 74, 84 (Criminal Court of the City of New York, Kings County, 1973) (Benjamin Altman, *J.*). While the New York Legislature would do well to consider remodeling its regulatory inspection statutes to incorporate the safeguards contained in the federal act which was adopted in the light of *Camara* and *See*, 21 U.S.C. § 880, and indeed has already remodeled them to restrict the right of inspection to representatives of the Health Department, Public Health Law § 3385, rather than "all peace officers within the state," see note 1 *supra*, we do not find the statutes here at issue so seriously deficient as to render unconstitutional this non-forcible inspection and seizure, during business hours, by a narcotics agent, of records of a licensed pharmacist, maintained on the premises as required, relating to narcotics and stimulant or depressant drugs.

The order granting the writ is reversed, with instructions to dismiss the petition.

APPENDIX B

District Court Opinion

District Court Opinion

CURTIN, District Judge.

[1] This case involves a petition for a writ of habeas corpus filed by a state defendant who stands convicted, but who has not yet begun to serve his sentence because he was released by this court on bail pending determination of the petition. Petitioner Salvatore Terraciano was convicted upon his entry of a plea of guilty of the crimes of criminal possession of a dangerous drug, second degree, and criminally selling a dangerous drug, second degree. Prior to entry of the plea, he had moved to suppress the use as evidence of certain records taken from his store, but the motion had been denied. Pursuant to Section 813-c of the former New York Code of Criminal Procedure, he had appealed his conviction, claiming that it was error to deny his suppression motion. The conviction was affirmed by the Appellate Division, Third Department, People v. Terraciano, 39 A.D.2d 1005, 333 N.Y.S. 2d 903 (3d Dept. 1972), and leave to appeal was denied. The petitioner having exhausted his available state remedies as required by 28 U.S.C. § 2254(b), his petition is properly before this court. *See* United States ex rel. B. v. Shelly, 430 F.2d 215, 217 (2d Cir. 1970); United States ex rel. Molloy v. Follette, 391 F.2d 231, 232 (2d Cir.), cert. denied, 391 U.S. 917, 88 S.Ct. 1812, 20 L.Ed.2d 658 (1968); United States ex rel. Rogers v. Warden, 381 F.2d 209, 212-215 (2d Cir. 1967).

The petitioner claims that the records taken from his store were seized in violation of his rights under the fourth amendment and that consequently the state trial court erred in not suppressing their use. The following facts relating to this claim are revealed by the transcript of the suppression hearing conducted by the state trial court.

The petitioner is a pharmacist licensed under the laws of the State of New York and, at the time of the events in question, owned and operated the Windsor Pharmacy in the Village of

Horseheads, New York. On April 10, 1969 Senior Investigator Michael Capozzi of the New York State Police entered the petitioner's store, walked behind the drug counter, showed his credentials and said he wanted to examine the petitioner's records. The petitioner said, "Just a minute," and attempted to call his attorney, saying he was not sure that Capozzi had the right to look at the records. Capozzi then left, but returned the next day with a warrant for the petitioner's arrest on a charge of obstructing governmental administration. Defendant was arraigned in the Horseheads Village Court on that charge.

On April 14, Capozzi returned in the company of Senior Narcotic Investigator Theodore Kowitt of the New York State Narcotics Control Bureau. Capozzi introduced Kowitt and left. Kowitt presented his credentials and gave the petitioner the warnings set forth in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Thereupon the petitioner called his attorney, who arrived after Kowitt had begun his inspection of records pertaining to narcotic, depressant and stimulant drugs maintained by the petitioner. Neither the petitioner nor his attorney explicitly objected to Kowitt's inspection, the petitioner explaining at the hearing that he did not want to get into more trouble and subject himself to another arrest by again refusing access to his records. Kowitt's inspection took two days and, at its conclusion, he removed from the petitioner's store and took with him certain records for which he gave the petitioner a receipt.

Kowitt's inspection was not conducted pursuant to a search warrant. At the hearing he testified that it was made under the authority granted by Sections 3350(2) and 3390(2) of the New York Public Health Law, McKinney's Consol. Laws. c. 45. These sections provide that investigators "shall have access at all times to all orders, prescriptions or records to be kept under [the laws regulating activities involving narcotic, depressant and stimulant drugs]."

[2] Administrative inspections of commercial establishments are subject to the strictures of the fourth amendment. *See* See v. City of Seattle, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967).[1] Consequently an inspection must be conducted pursuant to a search warrant unless it occurs under circumstances deemed to justify a warrantless inspection.

[3, 4] One such circumstance is a valid consent to the inspection. *See, e. g.*, United States v. Thriftimart, Inc., 429 F.2d 1006 (9th Cir.), cert. denied, 400 U.S. 926, 91 S.Ct. 188, 27 L.Ed.2d 185 (1970). Although a "manifestation of assent, no matter how casual," *Id.* at 1010, may suffice to constitute consent to an administrative inspection, consent is not established by a mere "acquiescense to a claim of lawful authority." Bumper v. North Carolina, 391 U.S. 543, 549, 88 S.Ct. 1788, 1792, 20 L.Ed.2d 797 (1968). See United States v. Kramer Grocery Co., 294 F.Supp. 65, 67-68 (E. D. Ark.), aff'd, 418 F.2d 987 (8th Cir. 1969). In the instant case the respondents do not contend that the petitioner consented to the in-

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[1] Pointing to Shapiro v. United States, 335 U.S. 1, 68 S.Ct. 1375, 92 L.Ed. 1787 (1948), the respondents contend that, because the records inspected at the petitioner's store were records the law required him to keep, they were subject to inspection without regard to restrictions imposed by the fourth amendment in other contexts. Although *Shapiro* has been cited in support of this proposition, *see* Cooper's Express, Inc. v. Interstate Commerce Commission, 330 F.2d 338, 340 (1st Cir. 1964), neither *Shapiro* nor Davis v. United States, 328 U.S. 582, 66 S.Ct. 1256, 90 L.Ed. 1453 (1946), appear to justify it. In *Shapiro* the Supreme Court held that, because certain documents were required by law to be kept, they became public documents, the production of which *in compliance with a subpoena* did not violate the fifth amendment privilege against self-incrimination. In short, no fourth amendment question was presented in *Shapiro*. *Davis*, the facts of which are somewhat similar to those in the instant case, has subsequently been interpreted as turning on the issue of consent. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed. 2d 854 (1973); Mancusi v. DeForte, 392 U.S. 364, 372 n. 11, 88 S.Ct. 2120, 20 L.Ed. 2d 1154 (1968); See v. City of Seattle, 387 U.S. 541, 545 n. 7, 87 S.Ct. 1737, 18 L.Ed. 2d 943 (1967).

Even if the proposition advanced by the respondents once stated the applicable law, it appears that in light of See v. City of Seattle, *supra*, it no longer does so. See United States v. Stanack Sales Co., 387 F.2d 849, 852 (3d Cir. 1968).

spection of the records at his store on April 14, 1969 and, under the facts set forth above, such a contention would be rejected. In light of the petitioner's arrest on a charge of obstructing governmental administration following his refusal to permit an inspection on April 10, his failure to object to the inspection on April 14 could not be anything but "acquiescence to a claim of lawful authority." *See* United States v. Kramer Grocery Co., *supra*.

[5] Even in the absence of consent, an administrative inspection may be made without a warrant if the business searched is one in which there is a legitimate public interest in close regulation and if the search is conducted under the authority of a statute meeting the requirements set forth in United States v. Biswell, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972). In *Biswell*, the Supreme Court upheld a warrantless search made pursuant to a federal statute permitting entry "during business hours [of] the premises (including places of storage) of [regulated firearms businesses] for the purpose of inspecting or examining (1) any records or documents required to be kept . . . and (2) any firearms or ammunition kept or stored . . . at such premises." 18 U.S.C. § 923(g). The search was lawful despite the absence of a warrant for it was made "[i]n the context of a regulatory inspection system of business premises which is carefully limited in time, place and scope. . . ." 406 U.S. at 315, 92 S.Ct. at 1596.

The rationale implicitly underlying the *Biswell* decision is stated in Colonnade Catering Corp. v. United States, 410 F.2d 197 (2d Cir. 1969), rev'd, 397 U.S. 72, 90 S.Ct. 774, 25 L.Ed.2d 60 (1970):

In contrast to such broad delegation of inspection authority [as that involved in *See, supra*], the statutory grants of inspection power here under review [26 U.S.C. §§ 5146(b) and 7606(a)] are carefully defined and narrowed to the point where

they grant little, if any, more authority than that which would be extended in a warrant issued by a magistrate after review. . . .

* * * * * *

. . . the imposition of a requirement that alcohol tax inspectors obtain warrants before carrying out the specifically defined inspection authorized by statute would serve no useful purpose in protecting the Fourth Amendment rights of the liquor dealer. Those rights are already protected by the restrictions contained in the statute itself. We are not dealing here with "area" or "general" searches of the type authorized by municipal codes, and there is no need to utilize the warrant machinery as a means of establishing standards for protection against unwarranted intrusions possible under such codes. Here the area eligible for inspection is clearly and narrowly defined; the purpose is relevant; the scope is limited; and all of these aspects are well known to the operator of the premises being inspected. Nothing of consequence therefore would be achieved through individualized review by a magistrate. In the proper exercise of his discretion, the magistrate would be compelled to issue a warrant as a matter of course, duplicating the limited authority already granted by statute. In short, the statute here under consideration is the equivalent of a warrant. 410 F.2d at 201, 202.

[6, 7] The practice of pharmacy, and particularly the sale of drugs, is an activity in which there is a legitimate public interest in close regulation and which is in fact pervasively regulated. *See* United States v. Montrom, 345 F.Supp. 1337, 1340 (E.D.-Pa.1972); McKaba v. Board of Regents of the University of the State of New York, 30 A.D.2d 495, 498, 294 N.Y.S.2d 382 (3rd Dept. 1968). Consequently, a search made pursuant to "a regulatory inspection system of business premises which is carefully limited in time, place and scope" would be lawful under *Biswell*. Sections 3350(2) and 3390(2) of the New York Public Health Law, allowing "access at all times to all orders,

prescriptions or records required to be kept," are not so limited, however. Unlike the statute in *Biswell*, they are not carefully limited in time and place and therefore are not the functional equivalent of a warrant. Their existence does not provide a lawful basis for the inspection involved here, and one must judge the inspection under ordinary fourth amendment standards. As was stated in Colonnade Catering Corp. v. United States, 397 U.S. 72, 77, 90 S.Ct. 774, 777, 25 L.Ed.2d 60 (1970), "[w]here [the legislature] has authorized inspection but made no rules governing the procedure that inspectors must follow, the Fourth Amendment and its various restrictive rules apply." The court finding no ground to justify the inspection among the exceptions to the warrant requirement of the fourth amendment, the inspection must be held to have been illegal.

The petition for a writ of habeas corpus is granted.

So ordered.

APPENDIX C

Statutory Provisions Involved

Statutory Provisions Involved

New York Public Health Law, §3350 provides:

> "1. It is hereby made the duty of the department, its officers, agents, inspectors, and representatives, and of all peace officers within the state, and of the judicial and police authorities of the state and of the political subdivisions thereof to enforce all provisions of this article, except those specifically delegated, and to cooperate with all agencies charged with the enforcement of the laws of the United States, of this state, and of all other states relating to narcotic drugs.
>
> "2. Such authorities and their agents shall have access at all times to all orders, prescriptions or records to be kept under this article."

New York Public Health Law, §3390 provides:

> "1. It is hereby made the duty of the department, its officers, agents, inspectors, and representatives, and of all peace officers within the state, and of the judicial and police authorities of the state and of the political subdivisions thereof to enforce all provisions of this article, except those specifically delegated, and to cooperate with all agencies charged with the enforcement of the laws of the United States, of this state, and of all other states relating to depressant and stimulant drugs.
>
> "2. Such authorities and their agents shall have access at all times to all orders, prescriptions or records to be kept under this article."

(These sections were repealed by L. 1972, c. 878, §1, and replaced by §3385, added L. 1972, c. 878. §2, effective April 1, 1973.)

Statutory Provisions Involved

New York Public Health Law, §3385 provides:

"1. The department and its representatives shall have access at all times to all orders, prescriptions or records required to be kept under this article.

"2. For the purpose of this article, each employee of the department designated by the commissioner shall possess all of the powers of a peace officer."

APPENDIX D

Federal Warrant Statute
21 U.S.C. § 880

Federal Warrant Statute

21 U.S.C. §880. Administrative inspections and warrants—Controlled premises defined

(a) As used in this section, the term "controlled premises" means—

(1) places where original or other records or documents required under this subchapter are kept or required to be kept, and

(2) places, including factories, warehouses, or other establishments, and conveyances, where persons registered under section 823 of this title (or exempted from registration under section 822(d) of this title) may lawfully hold, manufacture, or distribute, dispense, administer, or otherwise dispose of controlled substances.

Grant of authority; scope of inspections

(b) (1) For the purpose of inspecting, copying, and verifying the correctness of records, reports, or other documents required to be kept or made under this subchapter and otherwise facilitating the carrying out of his functions under this subchapter, the Attorney General is authorized, in accordance with this section, to enter controlled premises and to conduct administrative inspections thereof, and of the things specified in this section, relevant to those functions.

(2) Such entries and inspections shall be carried out through officers or employees (hereinafter referred to as "inspectors") designated by the Attorney General. Any such inspector, upon stating his purpose and presenting to the owner, operator, or agent in charge of such premises (A) appropriate credentials and (B) a written notice of his inspection authority (which notice in the case of an inspection requiring, or in fact supported by, an administrative inspection warrant shall consist of such warrant),

shall have the right to enter such premises and conduct such inspection at reasonable times.

(3) Except as may otherwise be indicated in an applicable inspection warrant, the inspector shall have the right—

(A) to inspect and copy records, reports, and other documents required to be kept or made under this subchapter;

(B) to inspect, within reasonable limits and in a reasonable manner, controlled premises and all pertinent equipment, finished and unfinished drugs and other substances or materials, containers, and labeling found therein, and, except as provided in paragraph (5) of this subsection, all other things therein (including records, files, papers, processes, controls, and facilities) appropriate for verification of the records, reports, and documents referred to in clause (A) or otherwise bearing on the provisions of this subchapter; and

(C) to inventory any stock of any controlled substance therein and obtain samples of any such substance.

(4) Except when the owner, operator, or agent in charge of the controlled premises so consents in writing, no inspection authorized by this section shall extend to—

(A) financial data;

(B) sales data other than shipment data; or

(C) pricing data.

Situations not requiring warrants

(c) A warrant under this section shall not be required for the inspection of books and records pursuant to an administrative subpena issued in accordance with section 876 of this title, nor for entries and administrative inspections (including seizures of property)—

(1) with the consent of the owner, operator, or agent in charge of the controlled premises;

(2) in situations presenting imminent danger to health or safety;

(3) in situations involving inspection of conveyances where there is reasonable cause to believe that the mobility of the conveyance makes it impracticable to obtain a warrant;

(4) in any other exceptional or emergency circumstance where time or opportunity to apply for a warrant is lacking; or

(5) in any other situations where a warrant is not constitutionally required.

Administrative inspection warrants; issuance; execution; probable cause

(d) Issuance and execution of administrative inspection warrants shall be as follows:

(1) Any judge of the United States or of a State court of record, or any United States magistrate, may, within his territorial jurisdiction, and upon proper oath or affirmation showing probable cause, issue warrants for the purpose of conducting administrative inspections authorized by this subchapter or regulations thereunder, and seizures of property appropriate to such inspections. For the purposes of this section, the term "probable cause" means a valid public interest in the effective enforcement of this subchapter or regulations thereunder sufficient to justify administrative inspections of the area, premises, building, or conveyance, or contents thereof, in the circumstances specified in the application for the warrant.

(2) A warrant shall issue only upon an affidavit of an officer or employee having knowledge of the facts alleged, sworn to before the judge or magistrate and establishing the grounds for

issuing the warrant. If the judge or magistrate is satisfied that grounds for the application exist or that there is probable cause to believe they exist, he shall issue a warrant identifying the area, premises, building, or conveyance to be inspected, the purpose of such inspection, and, where appropriate, the type of property to be inspected, if any. The warrant shall identify the items or types of property to be seized, if any. The warrant shall be directed to a person authorized under subsection (b) (2) of this section to execute it. The warrant shall state the grounds for its issuance and the name of the person or persons whose affidavit has been taken in support thereof. It shall command the person to whom it is directed to inspect the area, premises, building, or conveyance identified for the purpose specified, and, where appropriate, shall direct the seizure of the property specified. The warrant shall direct that it be served during normal business hours. It shall designate the judge or magistrate to whom it shall be returned.

(3) A warrant issued pursuant to this section must be executed and returned within ten days of its date unless, upon a showing by the United States of a need therefor, the judge or magistrate allows additional time in the warrant. If property is seized pursuant to a warrant, the person executing the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return of the warrant shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the person executing the warrant and of the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the person making such inventory, and shall be verified by the person executing the warrant. The judge or magistrate, upon request, shall deliver a copy of the

inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(4) The judge or magistrate who has issued a warrant under this section shall attach to the warrant a copy of the return and all papers filed in connection therewith and shall file them with the clerk of the district court of the United States for the judicial district in which the inspection was made.

APPENDIX E

Persons Authorized to Perform Warrantless Searches under Public Health Law, §§ 3350 and 3390

Persons Authorized to Perform Warrantless Searches under Public Health Law, §§ 3350 and 3390

Although amendments to the inspection authority have diminished the number of authorized inspectors, at the time of this search all peace officers were so authorized. The New York Criminal Procedure Law, §1.20(33) defines "peace officer" as;

Police Officers

Attendants, uniformed court officers or officials of the Supreme Court in the First and Second Departments

Attendants, uniformed court officers or other officials attached to the County Courts of Nassau and Suffolk Counties

Marshalls, clerks or attendants of a District Court

Clerks, uniformed court officers or other officials of the Criminal Court of the City of New York

Uniformed court officers or officials of the Civil Court of the City of New York

Attendants, clerks or uniformed court officers of the Family Court

Attendants, officials or guards of any state prison or of any penal correctional institution

Parole officers in the Department of Correctional Services

Harbor masters appointed by counties, cities, towns or villages

Investigators of the office of the State Commission of Investigation

Onondaga County park rangers

Officers or agents of the duly incorporated Society for the Prevention of Cruelty to Animals or Children

Persons Authorized to Perform Warrantless Searches under Public Health Law, §§ 3350 and 3390

Inspectors or investigators of the Department of Agriculture and Markets

Employees of the Department of Taxation and Finance assigned to enforcement of the tax on cigaretts imposed by Article 20 of the Tax Law by the Commissioner of Taxation and Finance

Employees of the New York City Finance Administration assigned to enforcement of tax on cigaretts imposed by Section D46-2.0 of the Administrative Code of the City of New York by the Finance Administrator

Constables or police constables of cities, counties, towns, or villages; or a bay constable of the Town of Hempstead

Suffolk County park rangers

Probation officers

Sheriff, under and deputy sheriffs of New York City

Long Island Railroad police officers

This section was amended in 1972 to include numerous other individuals within the category of peace officer.